National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: September 20, 1996

TO: F. Rozier Sharp, Regional Director, Region 17

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: Ironworkers, Local 10 (Glimcher Properties) Case 17-CD-352, Carpenters District Council (Glimcher Properties) Case 17-CD-353

560-7580-4033, 560-7580-4067, 597-2880-6760, 597-3212-9100

These Section 8(b)(4)(D) cases were submitted for advice on whether a pending unilateral settlement agreement of a prior 8(b)(4)(B) violation involving the same conduct barred further proceedings under Hollywood Roosevelt.[(1)]

The above Unions represented employees of various subcontractors working on a jobsite overseen by general contractor Koll Construction. On August 15, 1996, nonunion subcontractor Meyer appeared on the site. On the previous day, Ironworkers Local 10 (Local 10) told Koll that its members would not come onto the site if Meyer were there. When Meyer did arrive, both Local 10 and the Carpenters unions picketed and almost all the job site workers honored that picket line. The picket signs protested Meyer's violation of union area standards. On this day, Local 10 repeated to Koll that its members were refusing to work because of the presence of Meyer.

The following day, a reserved gate was established for Meyer and three other nonunion subcontractors also working on the site. The Carpenters advised Koll that as long as Meyer was on the site, Carpenter members would not work regardless of neutral gate access. Four days later on August 20, the Carpenters asked a neutral roofing subcontractor to honor the Unions' picketing. On August 22, the Carpenters asked another neutral subcontractor, Eliason & Knuth, to "get Koll to make this job right." According to Eliason & Knuth, because of previous conversations with the Carpenters, it clearly understood that a "right job" was a union job.

Finally, the Unions and various employers met on August 22 to try and resolve the Meyer problem. At that meeting, the Carpenters suggested that the problem could be resolved if Meyer's employees came into the Union on a 30-day work permit. Alternatively, a named Union subcontractor could take over Meyer's work and allow Meyer to supervise that subcontractor's employees.

On August 26, the attorney for Koll filed Section 8(b)(4)(B) charges against both Local 10 and the Carpenters alleging that the picketing had a secondary object of forcing Koll to cease doing business with Meyer.[(2)]

At that time, the Region advised Koll's attorney that the same evidence could also establish a Section 8(b)(4)(D) violation.[(3)]

The attorney declined to also file that charge.

On September 4, the Region and the Unions entered into a unilateral settlement agreement in the 8(b)(4)(B) cases filed by Koll. That settlement provided for a 14 day hiatus on all picketing and also contained the standard reservation language.[(4)]

A similar albeit bilateral settlement of the third charge was entered into by Eliason & Knuth and the Carpenters. Thereafter, on September 11, the Charging Party in this case, another subcontractor on this site, filed the instant Section 8(b)(4)(D) charges against both Unions alleging that the above August conduct also violated Section 8(b)(4)(D) of the Act.

We conclude, in agreement with the Region, that the Koll unilateral settlement agreements bar processing the instant Section 8

(b)(4)(D) charges.

It is well established that a settlement agreement disposes of all pre-settlement matters "unless prior violations were unknown to the General Counsel, not readily discoverable by investigation, or specifically reserved from the settlement by the mutual understanding of the parties."[(5)]

In interpreting the exception to the settlement-bar doctrine for conduct not "readily discoverable by investigation", the Board has looked at various factors including the time span between the litigated conduct and the settled conduct, and the availability of evidence regarding the litigated conduct at the time that the settlement was approved.[(6)]

In this case, it is clear that the Region had actual knowledge of the pre-settlement conduct now alleged to also violated Section 8(b)(4)(D). That conduct therefore cannot be the basis of the alleged violation, even in the presence of the reservation clause language excluding the settlement of "other cases."[(7)]

In these circumstances, it is irrelevant that the second charge attacking that same conduct was filed by a different charging party.[(8)]

We reject the argument that the General Counsel may institute Section 8(b)(4)(D) proceedings, despite the above settlement bar, because such proceedings would immediately result only in a Section 10(k) hearing. We recognize that, unlike a Section 8 (b)(4)(D) complaint proceeding, a Section 10(k) hearing is not an adjudicatory proceeding and is not required to be conducted under the Administrative Procedure Act.[(9)]

Nevertheless, if the charged union refuses to comply with the eventual 10(k) award, the General Counsel will issue complaint against the pre-10(k) conduct - conduct which is pre-settlement in our case.[(10)]

In sum, further proceedings with a Section 10(k) hearing is tantamount to proceeding against this pre-settlement conduct in derogation of the settlement bar.

Finally, the settlement's provision of a 14-day hiatus in all picketing necessarily has the effect of also remedying the instant Section 8(b)(4)(D) charges.[(11)]

Second, the settlement does not bar proceeding against any additional, future 8(b)(4)(D) conduct. In that regard, the reservation clause language may be used to admit the August statements to show that subsequent picketing retained the same work preservation object. We recognize that it may be difficult to establish that future picketing for an ostensibly different and lawful purpose nevertheless was for the same original work preservation object.[(12)] However, even if the instant settlement agreement were somehow revoked, this same evidentiary problem would nevertheless exist for any future Union picketing.

Accordingly, the Region should dismiss the instant charges, absent withdrawal, as barred by the outstanding settlement agreement.

B.J.K.

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[1] Hollywood Roosevelt Hotel Co., 235 NLRB 1397 (1978).

[2] On the following day, a third 8(b)(4)(B) charge was filed against the Carpenters by Eliason & Knuth whom the Carpenters had urged to "get Koll to make this job right."

[3] See, e.g., Ironworkers Local 10 (Vincent Metal Workers), 215 NLRB 153 (1974) (union threatening general contractor in order to have nonunion subcontractor work reassigned to union members violated 8(b)(4)(D)); Laborers, Local 1197 (J & K Enterprises), 309 NLRB 409 (1992).

[4] The settlement contained a "Scope of the Agreement" clause which provided: This Agreement settles only the allegations in the above-captioned case(s), and does not constitute a settlement of any other case(s) or matters. . . . The General Counsel reserves the right to use the evidence obtained in the investigation and prosecution of the above-captioned case(s) for any relevant purpose in the litigation of this or any other case(s)...

[5] Hollywood Roosevelt, 235 NLRB at 1397.

[6] Compare Hatfield Trucking Service, Inc., 270 NLRB 136, 137 (1984)(settlement bar found where prior settlement agreement involved threats of closure and interrogation, and General Counsel thereafter litigated actual closure and layoffs occurring three days after the threats), with Chattanooga Glass Co., 265 NLRB 691, 692 (1982)(no bar where post-settlement refusal to hire constituted a new and independent act of discrimination rather than the natural result of pre-settlement discharges).

[7] See, e.g., Ratliff Trucking Corp., Inc., 310 NLRB 1 (1993) (settlement bar found against a second charge attacking language in a union-security clause, where a first charge had attacked different language from the same union-security clause and had been settled; reservation clause language held inapplicable because second charge did not involve a different "other case").

[8] In fact, even if the General Counsel had not had actual knowledge of the alleged 8(b)(4)(D) conduct, the instant charge by a different charging party still arguably is barred because the first charging party's knowledge of those violations arguably may be imputed to the General Counsel. The Board has twice adopted ALJDs which imposed upon a Regional Director, before that Director approved the settlement agreement, a duty to ask the first charging party about potential violations. See Leeward Nursing Home, 278 NLRB 1058 (1986); Ventura Coastal Corp., 264 NLRB 291, 298 (1982).

[9] See ITT v. IBEW, Local 134, 419 U.S. 428, 446 (1975); NLRB v. Plasterers Local 79, 404 U.S. 116, 122 at note 10 (1971).

[10] See Warehouse Union Local 6 (Golden Grain Macaroni Co.), 289 NLRB 1 (1988), and cases cited in note 1.

[11] We note that the settlement's provision of a total hiatus in all picketing, including even lawful picketing, may have been a greater modicum of relief than the Board or a District Court would have provided in a litigated case. See Miller v. United Food & Commercial Workers, 708 F.2d 467, 471 (9th Cir. 1983); Johansen v. San Diego County Council of Carpenters, 745 F.2d 1289, 1294 (9th Cir. 1984) ("It is only in the exceptional case that primary picketing may be enjoined, preferably after an injunction limited to the secondary picketing has been tried and failed").

[12] See, e.g., Retail Clerks, Local 344 (Altos Myers Brothers, Inc.), 136 NLRB 1270, 1273 (1962) (where union picketed for unlawful object and then claimed to picket for a different, lawful object, Board rejected the "application of a presumption of the continuity of a state of affairs in construing the legality of picketing where there is no substantial evidence to support such a presumption."); see also Carpenters Local 1245 (New Mexico Properties, Inc.), 229 NLRB 236, 241 (1977).